92-1662

No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH STUART GRANDERSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Under 18 U.S.C. 3565(a), a defendant who was originally sentenced to a term of probation and who is found to have violated a condition of his probation ordinarily may be continued on probation or may have his sentence of probation revoked, in which case the court may impose any other sentence "that was available" at the time of the defendant's original sentence. If the defendant is found to be in possession of a controlled substance, however, the court must revoke the sentence of probation and must sentence the defendant to "not less than one-third of the original sentence." The question presented is whether the court of appeals erred in concluding that the term "original sentence" as used in Section 3565(a) refers to the sentence of imprisonment available under the Guidelines sentencing range applicable to the defendant at the time of his original sentencing hearing.

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The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 969 F.2d 980. The order of the district court (App., *infra*, 12a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1992. A petition for rehearing was denied on November 30, 1992. App., *infra*, 16a. On February 19, 1993, Justice Kennedy extended the time for filing a petition for a writ of certiorari to

and including April 15, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

In pertinent part, 18 U.S.C. 3565(a) provides:

> If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may * * *
>
> (1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or
>
> (2) revoke the sentence of probation and impose any other sentence that was available under subchapter A [*i.e.*, 18 U.S.C. 3551-3559, the general sentencing provisions] at the time of the initial sentencing.
>
> Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance * * * the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.

STATEMENT

1. Pursuant to a guilty plea entered in the United States District Court for the Northern District of Georgia, respondent was convicted on one count of delay or destruction of mail, in violation of 18 U.S.C. 1703(a). App., *infra*, 2a. The statutory maximum for respondent's offense was five years' imprisonment and a $250,000 fine. See 18 U.S.C. 1703(a), 3571. Under the Sentencing Guidelines, the potential imprisonment range, in light of respondent's adjusted

offense level and criminal history category, was zero to six months. App., *infra*, 2a. The district court imposed a sentence of five years' probation and a $2,000 fine. Rec. Exc. R1-7, at 2, 4. The conditions of probation included the requirement that respondent undergo periodic testing for illegal drug use. App., *infra*, 2a.

On June 28, 1991, respondent's probation officer filed a petition for revocation of respondent's probation, alleging that "[respondent] has possessed/used drugs in that on 5-10-91 and 6-7-91, [respondent] rendered urine samples which tested positive for cocaine metabolite." Rec. Exc. R1-10, at 1. Thereafter, the district court held a hearing on the petition to revoke the sentence of probation. The court found that respondent had possessed controlled substances within the meaning of 18 U.S.C. 3565(a), which provides that when "a defendant is found by the court to be in possession of a controlled substance * * * the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." Accordingly, the court revoked respondent's probation. See Transcript of Revocation of Probation Hearing (Tr.) 12-14, 18; App., *infra*, 12a-13a.[1]

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[1] Respondent admitted that he had used drugs, but he argued that mere use did not qualify as possession so as to require revocation of probation under Section 3565(a). Tr. 3. The government contended that drug use was inevitably accompanied by possession. Tr. 5. The court found in favor of the government on that issue. See Tr. 12 ("[T]here's no way that you can ingest it without possessing it"); App., *infra*, 13a ("A reasonable mind cannot conceive of a person using and ingesting of [*sic*] a controlled substance into the human

Applying 18 U.S.C. 3565(a), the district court then concluded that it was required to sentence respondent to a term of imprisonment that was at least one-third of the length of respondent's original sentence of probation. The court reasoned that the phrase "original sentence" as used in Section 3565(a) referred to the original sentence of probation that was actually imposed on respondent, not the potential sentence of imprisonment that was available under the applicable Guidelines sentencing range at the time of respondent's initial sentencing. App., *infra*, 12a-14a. Accordingly, the court sentenced respondent to a term of 20 months' imprisonment—one-third of the original five-year sentence of probation—to be followed by a three-year period of supervised release. App., *infra*, 14a; Tr. 18-19.

2. The court of appeals upheld the order revoking respondent's probation,[2] but it vacated his sentence. App., *infra*, 1a-11a. The court began its analysis by noting the existence of a circuit conflict on the meaning of the phrase "original sentence" as used in 18 U.S.C. 3565(a). App., *infra*, 5a-6a, citing *United States* v. *Corpuz*, 953 F.2d 526 (9th Cir. 1992) (holding that "original sentence" refers to the original sentence of probation); and *United States* v. *Gordon*, 961 F.2d 426 (3d Cir. 1992) (holding that "original sentence" refers to the sentencing range that was available under the Guidelines at the initial sentencing hearing). Aligning itself with the Third

body without having possession of that controlled substance.").

[2] The court of appeals rejected respondent's argument that he had not possessed drugs within the meaning of Section 3565(a). App., *infra*, 3a-4a.

Circuit's decision in *Gordon*, the court of appeals rejected the government's contention that the phrase "original sentence" in Section 3565(a) refers to the original sentence of probation that was actually imposed on the defendant.

Noting that respondent's original Guidelines sentencing range was zero to six months' imprisonment, the court of appeals declined to construe Section 3565(a) to permit imposition of a longer sentence on revocation of probation. Instead, the court reasoned that "[t]he length of [respondent's] original sentence is limited by the Guideline range available at the time that he was sentenced to probation. If [respondent] could not be subjected to [20] months incarceration for the crime of which he was convicted, he cannot now be sentenced to that term for violation of his probation." App., *infra*, 8a.

The court declined to follow the contrary reasoning of the Ninth Circuit in *Corpuz* and the Eighth Circuit in *United States* v. *Byrkett*, 961 F.2d 1399 (1992). See App., *infra*, 8a-9a & n.3. In concluding that the phrase "original sentence" referred to the defendant's original sentence of probation, those courts relied on the fact that probation, like incarceration, is a type of sentence under current federal sentencing law. The court of appeals found that reasoning to be flawed because "[p]robation and imprisonment are not fungible." *Id.* at 9a.

The court of appeals also rejected the Ninth Circuit's reliance on analogous language in 18 U.S.C. 3583(g). Under that provision, a defendant who possesses controlled substances while on supervised release will have his supervised release terminated and will be sentenced to "not less than one-third of the

term of supervised release." Reasoning that supervised release is "different from probation," the court of appeals rejected the contention that Section 3565(a) and Section 3583(g) should be construed in a similar fashion to achieve similar sentencing results. App., *infra*, 9a-10a.

Instead, the court of appeals pointed to 18 U.S.C. 3565(b), which provides that when a defendant possesses a firearm while on probation the court shall revoke the defendant's probation and sentence the defendant to "any other sentence that was available" at the time of the original sentencing. Conceding that the language of Section 3565(b) differs from the relevant language of Section 3565(a), the court nonetheless found it "unlikely" that Congress "intended that the use of two slightly different phrases in two otherwise similar provisions would lead to such dramatically different results." App., *infra*, 10a. Accordingly, the court vacated respondent's sentence of imprisonment. Because respondent had already served more than the six-month sentence of imprisonment that was the maximum that could have been imposed under the court of appeals' interpretation of Section 3565(a), the court ordered that respondent be released immediately.

REASONS FOR GRANTING THE PETITION

This case presents an important question of federal sentencing law on which the courts of appeals are divided. When a probationer violates his probation by possessing a controlled substance, 18 U.S.C. 3565(a) requires that his probation be revoked and that he be sentenced to a term of imprisonment that is "not less than one-third of the original sentence."

The differing interpretations of that statutory phrase that have been adopted by the courts of appeals lead to dramatically different results in otherwise identical cases. Moreover, the question of the proper sentencing range applicable in cases of this kind is one that arises with great frequency. This Court's review is necessary in order to ensure the uniformity of federal sentencing decisions and to resolve the conflict among the circuits.

1. The circuits are sharply divided over the question presented in this case. Four courts of appeals—the Eleventh Circuit below, the Tenth Circuit in *United States* v. *Diaz*, No. 92-2158 (Mar. 22, 1993), slip op. 4-7, the Sixth Circuit in *United States* v. *Clay*, 982 F.2d 959, 963-964 (1993), and the Third Circuit in *United States* v. *Gordon*, 961 F.2d 426, 430-433 (1992)—have held that the phrase "original sentence" as used in 18 U.S.C. 3565(a) refers to the sentencing range applicable to the defendant under the Sentencing Guidelines when the defendant was originally sentenced. Under that approach, the sentence imposed upon revocation of probation for possession of a controlled substance must be at least one-third of the sentence at the top of the applicable Guidelines sentencing range. See *United States* v. *Clay*, 982 F.2d at 964; *United States* v. *Gordon*, 961 F.2d at 433; App., *infra*, 10a.

Two other courts of appeals—the Eighth Circuit in *United States* v. *Byrkett*, 961 F.2d 1399, 1400-1401 (1992), and the Ninth Circuit in *United States* v. *Corpuz*, 953 F.2d 526, 528-530 (1992)—have held that the phrase "original sentence" as used in Section 3565(a) refers instead to the sentence of probation that was originally imposed on the defendant. Un-

der that interpretation, district courts must sentence a defendant who possesses drugs while on probation to a term of imprisonment that is at least one-third as long as the defendant's original term of probation. *United States* v. *Byrkett*, 961 F.2d at 1400-1401; *United States* v. *Corpuz*, 953 F.2d at 528-529.

These conflicting interpretations of Section 3565(a) lead to very different sentences in similar cases. Because probation is ordinarily available only for defendants whose Guidelines sentencing range does not exceed 6 to 12 months, the approach followed by the Third, Sixth, and Tenth Circuits and by the court of appeals in this case will ordinarily yield a minimum mandatory term of 2 to 4 months' imprisonment on revocation of probation. Under the approach followed by the Eighth and Ninth Circuits, on the other hand, the possible range of sentences available on revocation of probation varies according to the length of the sentence of probation originally imposed on the defendant. In felony cases, the minimum sentence required by Section 3565(a) will range from 4 to 20 months' imprisonment, because the authorized sentences of probation range from 12 to 60 months. 18 U.S.C. 3561(b)(1); Sentencing Guidelines § 5B1.2.[3]

In this case, the court of appeals' approach mandated a minimum sentence of only two months' imprisonment. If the case had arisen in the Eighth or

[3] In some cases—frequently cases involving misdemeanors—in which a sentence of probation is authorized, the maximum term of probation is limited to 36 months. See Sentencing Guidelines § 5B1.2(a)(2). In those cases, the minimum sentence required by Section 3565(a) would not exceed 12 months.

Ninth Circuits, a sentence of at least 20 months' imprisonment would have been required. Similar disparities will be created in most other cases in which revocation of probation results from or is accompanied by a finding of drug possession. As a result, the term of incarceration served by defendants after revocation of probation will vary widely depending on the circuit in which the defendant was originally convicted.

Unlike many other issues of federal sentencing law, this case involves the interpretation of a statute rather than the Guidelines, and the question it raises therefore cannot be resolved by the Sentencing Commission. See *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991). Moreover, the question is one that arises with considerable frequency, as is demonstrated by the fact that it has generated six published decisions of the courts of appeals in less than two years.[4] The circuit conflict on the issue shows no sign of narrowing.[5] Accordingly, review by this Court is warranted.

2. The court of appeals erred in its construction of the phrase "original sentence" as used in Section 3565(a).

When a defendant possesses controlled substances while on probation, Section 3565(a) requires the dis-

[4] Those decisions have, moreover, exhaustively canvassed the relevant arguments in favor of and against the various interpretations of the statute, so there is no reason to await further consideration of the issue in the lower courts.

[5] The Ninth Circuit recently declined to depart from its holding in *Corpuz* despite the existence of the circuit conflict. See *United States* v. *Avakian*, No. 92-10269, 1992 U.S. App. LEXIS 32326 (9th Cir. Dec. 2, 1992).

trict court to "revoke the sentence of probation" and sentence the defendant to "not less than one-third of the original sentence." The statute contains no definition of the phrase "original sentence." It is clear, however, that probation is a "sentence" within the meaning of federal sentencing law in general and Section 3565 in particular. See 18 U.S.C. 3565(a), (a)(2), and (b) (referring to "the sentence of probation"); see also 18 U.S.C. 3561(a) ("A defendant * * * may be sentenced to a term of probation"); 18 U.S.C. 3563(a) ("a sentence of probation"); 18 U.S.C. 3564(a) ("A term of probation commences on the day that the sentence of probation is imposed").[6] Thus, in the context of probation revoca-

[6] Prior to 1984, the federal sentencing scheme treated probation as an alternative to a sentence, rather than as a sentence in its own right. See *United States* v. *Corpuz*, 953 F.2d at 528. The Sentencing Reform Act of 1984 worked substantial changes in the system of federal sentencing, however, including a marked shift from the traditional view of probation as merely a reprieve from a sentence of imprisonment. As the Committee Report accompanying the 1984 Act declared, "[p]roposed 18 U.S.C. 3561, unlike current law, states that probation is a type of sentence rather than a suspension of the imposition or execution of a sentence." S. Rep. No. 225, 98th Cong., 1st Sess. 88 (1983). The Sentencing Guidelines confirm that understanding of the statute. See Guidelines § 7A2(a) ("the Sentencing Reform Act recognized probation as a sentence in itself"). Accordingly, the Third and Sixth Circuits clearly erred in rejecting the government's interpretation of Section 3565(a) on the ground that probation is not a sentence within the meaning of the phrase "original sentence." See *United States* v. *Clay*, 982 F.2d at 962 (declining to treat probation as a "sentence" for purposes of Section 3565(a) because "the term 'original sentence' should mean what it has always meant—a sentence of imprisonment"); *United States* v. *Gordon*, 961 F.2d at 432 (holding

tion, the term "original sentence" refers to the original sentence of probation that was imposed on the defendant at the initial sentencing hearing, and a mandatory sentence of imprisonment of "not less than one-third of the original sentence" means a term of imprisonment at least one-third as long as the original sentence of probation.

The court of appeals held that the phrase "original sentence" refers to the top of the Sentencing Guidelines sentencing range applicable to the defendant at the time of his initial sentencing hearing. That interpretation of Section 3565(a) cannot be squared with the plain language of the statute, because a potential sentence of imprisonment that could have been imposed on a defendant is simply not the "original sentence" that the defendant actually received. As Judge Greenberg cogently observed in *Gordon*, "as a simple matter of plain meaning, I do not understand how the term 'original sentence' * * * can be equated to the maximum available sentence under the guideline range in cases such as this where the maximum available sentence has not been imposed. To me the term 'original sentence' means an actual as contrasted to an 'available' sentence." 961 F.2d at 434 (Greenberg, J., concurring in judgment).

The conclusion that the phrase "original sentence" refers to the original sentence of probation actually imposed on the defendant receives further support from Congress's resolution of the same issue in the context of supervised release. Under 18 U.S.C.

that statutory references to probation as a "sentence" worked "merely a change in form, rather than substance," and thus that Congress could not have intended the phrase "original sentence" to refer to the original sentence of probation).

3583(g), a defendant who is found in possession of a controlled substance during a term of supervised release must be sentenced to a term of imprisonment that is "not less than one-third of the term of supervised release." Congress obviously viewed that provision and Section 3565(a) as parallel and closely related because it included both of them in the same section of the Anti-Drug Abuse Act of 1988. See Pub. L. No. 100-690, Tit. VII, § 7303(a)(2) ("one-third of the original sentence"), (b)(2) ("one-third of the term of supervised release"), 102 Stat. 4464. These two provisions were directed at precisely the same problem, and it is therefore reasonable to construe them *in pari materia* to call for parallel treatment of drug offenders who are under non-custodial supervision.

To be sure, Congress did not make its meaning as clear in Section 3565(a) as it did in Section 3583(g); Section 3565(a) would have been clearer if Congress had not simply referred to "one-third of the original sentence," but had referred instead to "one-third of the original sentence of probation." But because, in the context of probation revocation, the "original sentence" is always a sentence of probation, it should not have been necessary for Congress to add the specific reference to probation in order for the meaning of Section 3565(a) to be clear.

The term "original sentence" cannot plausibly be read to mean "the top sentence of imprisonment that would have been available under the defendant's Guidelines sentencing range if the district court had chosen to impose a sentence of imprisonment at the original sentencing hearing." Nonetheless, four circuits have now adopted that unlikely construction of the statute. Because the circuits are badly divided on

a significant question of federal sentencing law, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-8728

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

RALPH STUART GRANDERSON, JR.,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Georgia

Aug. 4, 1992

Before KRAVITCH, Circuit Judge, CLARK*, Senior Circuit Judge, and PITTMAN**, Senior District Judge.

KRAVITCH, Circuit Judge:

Defendant-Appellant Ralph Granderson appeals a district court order revoking his probation due to pos-

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

session of a controlled substance and sentencing him to twenty months incarceration. For the reasons discussed below, we vacate the sentence and order the appellant released from custody.

I. FACTS

Ralph Granderson was charged by information in federal district court with one count of delay or destruction of mail under 18 U.S.C. § 1703(a), which carries a possible term of zero to six months incarceration under the Sentencing Guidelines. *See* U.S.S.G. § 2B1.3. He pled guilty on March 18, 1991, and received a term of five years probation, which included a standard provision for urinary testing for use of alcohol and drugs.

Granderson's probation officer filed an application for revocation of probation on June 28, 1991, informing the court that the appellant's urine sample had tested positive for cocaine. The district court held a hearing on the application and determined that there was a violation of the conditions of probation.

Under the Anti-Drug Abuse Act of 1988, if a probationer is found to be in possession of a controlled substance, "[n]otwithstanding any other provision of this section, . . . the court *shall* revoke the sentence of probation and sentence the defendant to *not less than one-third of the original sentence*." 18 U.S.C. § 3565(a)(1988) (emphasis added). The district court determined that Granderson's original sentence was a term of five years (sixty months) probation. The court calculated that one-third of that term was twenty months incarceration, which defendant was directed to serve, followed by a period of three years supervised release. Granderson has been incarcerated since August 26, 1991.

Defendant appealed, contending (1) that he did not "possess" drugs within the meaning of section 3565; and (2) that the district court erred in concluding that the "original sentence" to which section 3565 referred was five years, rather than zero to six months, the term of incarceration to which he could have been sentenced.[1]

II. ANALYSIS

A. *"Possession" of Drugs*

The defendant contends that his positive urinalysis demonstrates that he merely "used" drugs and was not in "possession" of cocaine within the meaning of section 3565. Granderson correctly notes that the Sentencing Guidelines leaves [*sic*] to the district court the determination of whether evidence of drug usage established solely by laboratory analysis constitutes "possession of a controlled substance" as set forth in the statutes. U.S.S.G. § 7B1.4, application note 5. The district court, however, reviewed the evidence, exercised its factfinding power and determined that the defendant had possessed cocaine and thereby violated probation. A district court's findings of fact are binding on this court unless clearly erroneous. *United States v. Forbes*, 888 F.2d 752, 754 (11th Cir. 1989). Appellant has given us no reason to question the validity of the court's finding; accordingly,

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[1] At oral argument, appellant also contended that the district court erred in not considering alternatives to incarceration, noting that section 3565 does not specify what form of punishment should replace the revoked probation. Granderson did not raise this issue to the district court, nor did he brief the question on appeal; therefore, it is not properly before this court.

we affirm the district court's revocation of probation for possession of a controlled substance.

B. *The "Original Sentence"*

Section 3565 sets out the standards for revocation of probation. Prior to the 1988 amendments, if the district court determined that a defendant had violated the terms of his probation, the court had the discretion to:

> (1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or
>
> (2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

18 U.S.C. § 3565(a) (1984). As noted above, the 1988 amendments to section 3565 make revocation of probation mandatory if a probationer possesses a controlled substance; the district court shall then impose a sentence of incarceration of not less than one-third of the original sentence.

The question presented is whether the term "one-third of the original sentence" in section 3565 refers to the term of probation or the term of incarceration to which the defendant could have been sentenced. The government contends that the district court correctly determined that the act refers to the term of probation, which is sixty months, and that the court was required to impose at least a twenty-month prison sentence. The defendant, on the other hand, points out that the crime for which he actually was sentenced carries a possible term of incarceration of

only zero to six months and, therefore, he is subject to only a mandatory sentence of two to six months incarceration.

We review legal interpretations of sentencing provisions and the legality of a sentence *de novo*. *U.S. v. Scroggins*, 880 F.2d 1204, 1206 n. 5 (11th Cir. 1989), *cert. denied*, 494 U.S. 1083, 110 S.Ct. 1816, 108 L.Ed.2d 946 (1990).

We must first look to the meaning of the term "sentence" as used by Congress in section 3565. Prior to the Sentencing Reform Act of 1984, probation was not considered a sentence. A court could either (1) suspend the imposition of sentence and place the defendant on probation, or (2) impose a prison sentence, suspend its execution and put the defendant on probation. *See* 18 U.S.C. § 3651 (1982) (repealed 1986). Under the Comprehensive Crime Control Act of 1984, however, probation is a type of sentence in and of itself. *See* 18 U.S.C. § 3561 (1985); *United States v. Smith*, 907 F.2d 133, 134 n. 1 (11th Cir. 1990).

The meaning of the term "original sentence" as used in section 3565 is a question of first impression in this circuit. The circuits that have considered the issue have reached opposite conclusions. In *United States v. Corpuz*, 953 F.2d 526 (9th Cir. 1992), the appellant pled guilty to a charge of counterfeiting; under the Sentencing Guidelines, he faced incarceration for one to seven months, but the district court sentenced him to three years probation. One year later, Corpuz was found to have possessed methamphetamine and his probation was revoked. He was sentenced to one year incarceration. The Ninth Circuit upheld the sentence.

The Third Circuit reached the opposite conclusion in *United States v. Gordon*, 961 F.2d 426 (3rd Cir. 1992), a case almost identical to the one before us. In *Gordon*, the defendant pled guilty to one count of interfering with the mails under 18 U.S.C. § 1703. She could have received a sentence of zero to four months imprisonment, but was sentenced to three years probation. Gordon tested positive for cocaine, had her probation revoked, and was sentenced to one year incarceration. The Third Circuit overturned the sentence, taking issue both with the Ninth Circuit's statutory interpretation and its attempts at "legal alchemy to transform three years probation into one year imprisonment under the 1988 drug amendment." *Gordon*, 961 F.2d at 432. The *Gordon* court also disagreed with the concept of probation as a sentence unto itself. Although we agree with the general approach of the Third Circuit in *Gordon*, we also take the opportunity to relate where our analyses diverge.

The statute does not specify whether the term "original sentence" refers to the term of probation or to the range of incarceration established by the Guidelines. When interpreting ambiguous criminal statutes, the rule of lenity comes into play: We "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Bifulco v. United States*, 447 U.S. 381, 387, 100 S.Ct. 2247, 2252, 65 L.Ed.2d 205 (1980). As we stated in *United States v. Winchester*, 916 F.2d 601, 607 (11th Cir. 1990), the rule "rests on the fear that expansive judicial interpretations will create penalties not originally intended by the legislature" and is "an outgrowth of our reluctance to increase or multiply punishments absent a clear and definitive legislative directive" (citations omitted).

Granderson pled guilty to and was convicted of tampering with the mails, a crime that carries a maximum sentence of six months incarceration. He was never convicted of or even charged with possession of cocaine. The Government was free to indict him on drug charges but chose not to do so. Instead, it proceeded with a probation revocation hearing, at which a court can order imprisonment when it is reasonably satisfied that the probation conditions have been violated; the Government does not have the burden of proving beyond a reasonable doubt that the defendant committed the acts alleged. *United States v. Taylor*, 931 F.2d 842, 848 (11th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1191, 117 L.Ed.2d 433 (992). Possession of cocaine provided the reason for revocation of probation, but it is not the crime for which Granderson is incarcerated. In its policy statements concerning revocation of probation, the Sentencing Commission established that resentencing for violations of probation should sanction primarily the "defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator." U.S.S.G. Chapter 7, Pt. A, 3(b), at 336-337. The Guidelines explicitly reject resentencing violators for the particular conduct triggering the revocation "as if that conduct were being sentenced as new federal criminal conduct." *Id.*[2]

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[2] We note that even if the government had indicted Granderson for possession of cocaine under 21 U.S.C. § 841 (a), he would have faced a statutory maximum of one year imprisonment; instead, he is serving more than one and a half years.

In *United States v. Smith*, 907 F.2d 133 (11th Cir. 1990), we held that when a defendant's probation is revoked, resentencing is limited to the sentence that was available at the time the underlying offense was committed. A court has discretion to impose a new sentence within the applicable range prescribed by law, but "the guidelines control the imposition of a new sentence after probation revocation in the sense that the original determinations of total offense level and criminal history category . . . delimit the sentences that were then available." *Smith*, 907 F.2d at 135. In *Smith*, the defendant was resentenced under the pre-1988 section 3565, for which revocation was discretionary and a defendant was not subject to mandatory incarceration for a minimum of one-third of the original sentence. Its underlying logic, however, still rings true. The length of Granderson's original sentence is limited by the Guideline range available at the time that he was sentenced to probation. If Granderson could not be subjected to eighteen months incarceration for the crime of which he was convicted, he cannot now be sentenced to that term for violation of his probation. Moreover, by the Government's contorted mathematics, Granderson would be considered to have had an "original sentence" of sixty months incarceration, which is not consistent with the Guidelines.

In reaching the opposite conclusion, the Ninth Circuit focused on the fact that Congress used the phrase "original sentence" in the amendment, not "original period of incarceration," or "any other sentence that was available . . . at the time of the initial sentencing," *Corpuz*, 953 F.2d at 528. The court was not troubled by the conversion of time served on probation to time served in prison; the Ninth Circuit

apparently reasoned that because incarceration and probation are both types of sentences, the two are interchangeable, at least for the purpose of resentencing.[3]

We disagree. Probation and imprisonment are not fungible. As the Third Circuit noted, probation is a form of "conditional liberty" that is likely to be longer than a term of imprisonment. *Gordon*, 961 F.2d at 432 (quoting *Black v. Romano*, 471 U.S. 606, 611, 105 S.Ct. 2254, 2257, 85 L.Ed.2d 636 (1985)). In this case, *instead* of a possible six months incarceration, Granderson received five years probation, a restraint on his liberty that is less severe than imprisonment, but lasts ten times longer. The trade-off was undoubtedly worthwhile to the defendant and illustrates the fallacy of simply converting a term of probation into one of incarceration without taking these differences into account.

The district court and the Ninth Circuit also relied on the fact that the provision relating to violations of supervised release is very similar to the section at issue here:

> If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release.

18 U.S.C. 3583(g) (1988). Supervised release, however, is different from probation. When a defendant receives a sentence of probation, it is an *alternative*

[3] The Eighth Circuit concurred with this approach in *United States v. Byrkett*, 961 F.2d 1399 (8th Cir. 1992).

to imprisonment; a defendant serving time on supervised release has already served his sentence of incarceration and is subject to supervision analogous to what was formerly called "special parole." *See* U.S.S.G. Ch. 7, Pt. A, 2(b).

In another part of the Anti-Drug Abuse Act, section 3565(b), Congress provided for mandatory revocation of probation for possession of a firearm. However, section 3565(b) provides that "the court shall . . . revoke the sentence of probation and impose *any other sentence that was available under subchapter A at the time of the initial sentencing*," 18 U.S.C. § 3565(b) (1988) (emphasis added). Therefore, under section 3565(b), if Granderson had possessed a firearm, he would be subject to only six months incarceration. The government argues that Congress intended to prescribe harsh penalties for possession of drugs. We do not dispute that fact. It is unlikely, however, that Congress intended that the use of two slightly different phrases in two otherwise similar provisions would lead to such dramatically different results. Interpreting the term "original sentence" to mean the sentence of incarceration faced by Granderson under the Guidelines is consistent with the rest of the statute; the mandatory imposition of one-third of that time produces a strict penalty for violation of probation due to possession of a controlled substance.[4] We agree with the Third Circuit that read-

[4] We note that section 3565(a) refers to the imposition of "*at least* one third of the original sentence," which appears to expose Granderson to a possible sentence of sixty months incarceration. At oral argument, the government disputed this interpretation and contended that the minimum term of incarceration was also a maximum sentence. Because Granderson received only a sentence of twenty months, we need not resolve this issue, but merely point out another difficulty with the government's reading of the provision.

ing the provision as the government argues is a form of legal alchemy that would lead to unreasonably harsh results not clearly intended by Congress.

III. CONCLUSION

We are not convinced that Congress intended the term "original sentence" to mean a period of probation imposed in the alternative to incarceration, such that a violation of probation would subject the defendant to more than three times the length of imprisonment he faced when sentenced for his crime. Granderson has already been incarcerated for more than eleven months, although the crime of which he was convicted carries a maximum of six months under the Guidelines. The sentence of twenty months incarceration is VACATED and the appellant is hereby ORDERED released from custody forthwith. The Clerk is directed to issue the mandate upon filing of this opinion.

VACATED and SO ORDERED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Criminal No. 1:91-CR-01

UNITED STATES OF AMERICA

versus

RALPH STUART GRANDERSON, JR.

[Filed Aug. 2, 1991]

ORDER

The captioned matter came before the court for a hearing on July 29, 1991, on the application for revocation of probation. The defendant appeared with his attorney, Greg Smith, Esq., and the government was represented by Assistant United States Attorney Janet King, Esq.

The defendant admitted the allegations of facts concerning revocation of probation, i.e., that he had taken drugs while on probation. The court therefore determined that there was a violation of the conditions of probation.

The defendant contended that the court was limited in sentencing after revocation to the sentence that was available to the court under the guidelines at the time of the original sentence in this case. The guideline range at that time was zero to six months. The

government contended that pursuant to 18 U.S.C. § 3565(a) the court must revoke probation and must impose a sentence of at least one-third of the sentence imposed in the original case. This defendant had originally been sentenced to five years probation. The foregoing code section provides that "notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance thereby violating the condition imposed by § 3563(a)(3), the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence."

The court is of the opinion that Congress used language contemplating a sentence under the previous law which sentence was suspended and probation imposed. Under the sentencing scheme as contemplated by the Sentencing Reform Act of 1984 and the guidelines promulgated pursuant thereto, probation is in fact imposed as a sentence.

While the defendant argued that 18 U.S.C. § 3565 was not applicable because the defendant had merely used drugs and was not in possession of them, the court rejects that argument. A reasonable mind cannot conceive of a person using and ingesting of a controlled substance into the human body without having possession of that controlled substance. The court has therefore found that § 3565(a) is applicable.

We then reach the question as to what Congress meant by one-third of the original sentence. The court finds comfort and guidance in a similar statute relating to possession of a controlled substance in the instance of a defendant on "supervised release." 18 U.S.C. § 3583(g) provides "if the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of super-

vised release and require the defendant to serve in prison not less than one-third of the term of supervised release." The Congress could have used similar language in § 3565 but did not; however, the court is of the opinion that it was the intent of Congress to accomplish the same in both sections.

The court takes note of the case of *U.S. v. Smith*, 907 F.2d 133 (11th Cir. 1990) which states that the court is limited in revocation to the sentence that could have been imposed under the guidelines; however, that case arose under the law prior to the amendment of § 3565 to add the provision now being discussed.

The court therefore believes that it is controlled by 18 U.S.C. § 3565(a) and therefore must impose a sentence of not less than one-third of the sentence of probation. The sentence of probation was five years or sixty months and therefore the court must revoke the probation and impose at least a twenty-month sentence.

The court has ordered that the defendant, Ralph Stuart Granderson, Jr., pursuant to 18 U.S.C. § 3565(a) is hereby committed to the custody of the Bureau of Prisons for a term of twenty months, to be followed by a period of supervised release of three years. Otherwise, the sentence previously imposed by this court by order of March 18, 1991, shall remain unchanged.

The execution of the imprisonment portion of the sentence is hereby deferred until August 26, 1991, at which time the defendant is directed to report to the institution designated for the service of the sentence, or if no designation has been made by the Bureau of Prisons, the defendant shall report to the United States Marshal at the United States Courthouse, Atlanta, Georgia, on or before 12:00 noon on August 26, 1991.

The court recommends that this defendant be incarcerated in an institution that will provide drug treatment to the defendant.

It is further directed that a copy of his order and judgment and commitment be served upon the defendant, defendant's attorney, the Assistant United States Attorney, United States Marshal, United States Probation Office and the Bureau of Prisons.

IT IS SO ORDERED this 2nd day of August, 1991.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8728

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

versus

RALPH STUART GRANDERSON, JR.,
DEFENDANT-APPELLANT

On Appeal from the United States District Court
for the Northern District of Georgia

[Filed Nov. 30, 1992]

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH, Circuit Judge, CLARK*, Senior Circuit Judge, and PITTMAN**, Senior District Judge.

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

PER CURIAM:

☒ The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8728

D.C. Docket No. 1:91-CR-01

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

versus

RALPH STUART GRANDERSON, JR.,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Georgia

[Filed Aug. 4, 1992]

Before KRAVITCH, Circuit Judge, CLARK*, Senior Circuit Judge, and PITTMAN**, Senior District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the sentence imposed by the District Court in this cause of twenty months incarceration is hereby VACATED; and the appellant is hereby ORDERED released from custody forthwith, in accordance with the opinion of this Court.

Entered: August 4, 1992

For the Court: MIGUEL J. CORTEZ, Clerk

By: /s/ Karleen McDabe
Deputy Clerk

Issued as Mandate: August 4, 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60298